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APR

IN THE

Supreme Court of the United States,

OCTOBER TERM 1935

No. [redacted] 11

L. P. CHISHOLM,
WALLER HOLLADAY,
W. EARLE CRANK,
T. S. WINSTON AND
W. R. DUNKUM, Petitioners.

v.

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

REPLY TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your respondent prays that a writ of certiorari to the Circuit Court of Appeals of the United States for the Fourth Circuit to review its final judgment in this case, entered January 7, 1936 (R. 79), be refused.

There is no error in the finding of the Trial Court or the Circuit Court of Appeals, and there is no novel question involved, and no issue upon which there is a different ruling by different Circuit Courts of Appeal. The apparent difference in the holding of the New York District and Circuit Courts and the other Courts is explained in the

case of Eley v. Gamble, 75 F. (2d) 171, 172, 173. The grounds on which the writ is requested are as follows:

1. The action was commenced by notice without process.
2. The case was continued as to the personal representative of a decedent on plea of insanity.
3. The Court found defendants were joint adventurers and jointly and severally liable for stock assessments.
4. Errors in rulings on admissibility of evidence. This last point is not argued in the petition.

We will discuss the first three in the order named.

PETITIONERS' OBJECTION TO JURISDICTION

1. Petitioners contend that no process can issue out of a Federal Court under section 721 of the Judicial Code of the United States unless sealed with the seal of the Court and signed by the Clerk.

2. That no persons except those who voluntarily appear can be made a party defendant to a proceeding in a Federal Court so as to get a personal judgment against them unless served with process issued under section 721 of the Judicial Code.

3. That this action was commenced without process under the seal of the Court and signed by the Clerk, and that therefore the Court acquired no jurisdiction over the person of any of the peitioners.

It is conceded that process *issuing from a Federal Court* must be under the seal of the Court and signed by the Clerk. It is also true that section 106 of the Virginia Constitution provides,

> "Writs shall run in the name of the Commonwealth of Virginia and be attested by the Clerk of the several Courts. . . ."

But this section of the Virginia Constitution has not prevented the institution of actions in Virginia by what is known in the Virginia practice as notice of motion, for

more than seventy-five years. In fact its constitutionality seems never to have been questioned in the Virginia state courts. For many years this has been almost the only form of civil action brought in the common law courts of Virginia. Similarly since the case of Leas and McVitty v. Merriman, 132 Fed. 510 decided by the United States District Court of the Western District of Virginia in 1904 it has become the general form of common law civil action in the Federal Courts of Virginia. The legality of it from 1904 to 1934 was apparently never questioned in the Federal Courts though 14% to 95% of the cases in the Federal Courts were instituted by it. Eley v. Gamble, 75 Fed. (2d) 171, 173.

NATURE OF PROCEEDINGS BY NOTICE OF MOTION FOR JUDGMENT

> "The procedure by motion (after notice) for a judgment is practically what is known as 'code pleading,' plain and simple, and is destitute of the formalities usual in common-law actions. The notice takes the place of both the writ and declaration in common-law actions. It takes the place of the writ by notifying the defendant when and where he is to appear, and of the declaration by setting out the cause of complaint. As hereinafter stated, the notice is, in legal contemplation, presumed to have been prepared by the plaintiff himself, or some layman, and hence great liberality of construction is indulged by the courts in determining its sufficiency. It is wholly informal, and, as it is always returnable to some day of a term of court, there are no proceedings at the rules. The notice prior to its return to the clerk's office is not an official document, and the clerk makes no note of it generally until it has been executed and returned to his office. Then and then only is it an official document." Burks Pleading & Practice, sec. 153, pp. 219, 220.

This is the great practice work of the State of Virginia. It was prepared by the late Judge Martin P. Burks for

years head of the law school at Washington & Lee University and later from 1917 to 1928 Judge of the Supreme Court of Appeals of Virginia. It has been for twenty years the text book on Virginia Pleading and Practice used at the University of Virginia law school.

Section 6046 authorizing this procedure is printed in the Appendix, page 17.

NOTICE OF MOTION FOR JUDGMENT NOT PROCESS OR WRIT

The notice of motion is not process under section 721 of United States Code or a writ under section 106 of Virginia Constitution. It differs from process as follows:

1. Process is signed by the Clerk of the Court and the notice of motion by the party or his attorney.

2. Process runs in the name of King, President or State and notice in the name of the plaintiff.

3. Process in Virginia is directed to the Sheriff or other Court officer. A notice is directed to the defendant.

4. A process is a Court paper from its issuance. A notice is a Court paper only when returned to the Clerk of the Court after being executed.

5. Process must generally be served by an officer. A notice under section 6041 of the Code is sufficient "which has reached its destination, within the time prescribed by law . . . although not served in the manner above mentioned."

6. Issuance of a process stops the running of the statute of limitations. Only the return of the executed notice to the Clerk's Office stops the statute. Furts Bros. v. Banks, 101 Va. 208, 42 S. E. 360, Burks Pleading & Practice 2nd Ed. 241, 242.

7. Process is a command to the party against whom it is issued. A notice is not a command but is merely notification of the proposed action of the plaintiff.

This was first held in Kain v. Ashworth, 119 Va. 605, 89 S. E. 857, September 11, 1916.

". . . A process emanates from a court and under the provisions of section 6055 is usually directed to the sheriff of the county, while a notice which takes the place of the writ and declaration is directed to the defendants named therein and has its emanation in the act of the plaintiff in sending it forth, and may be served by a layman." Wood v. Kane, 143 Va. 281, 286, 89 S. E. 857. (Sept. 1925.)

This is the usual and proper procedure in the United States District Courts in Virginia. The practice in the Eastern District of Virginia and the law is very fully gone into by the United States Circuit Court of Appeals in 1935 in the case of Eley v. Gamble, 75 F. (2d) 171. An able and carefully worked out opinion was handed down by Judge Parker the senior Circuit Judge. We quote at length from this opinion:

"These are appeals from judgments in favor of the receiver of the First National Bank of Portsmouth, Va., in actions instituted by him to recover on stock assessments made by the Comptroller of the Currency against the stockholders of that bank. All of these actions except three, Nos. 3771, 3774, and 3775, were instituted by notice of motion for judgment pursuant to the Virginia statute, Code of 1930, sec. 6046; and in each of them a plea in abatement was filed on the ground that the notice of motion did not conform to section 911 of the Revised Statutes (28 U. S. C. A., sec. 721) requiring that 'all writs and processes issuing from the courts of the United States' shall be under the seal of the court from which they issue, bear teste of the judge, and be signed by the clerk. In No. 3772 the additional point was raised, by motion to dismiss, that the notice of motion had not been properly served upon the defendant. Nos. 3771, 3774 and 3775 were actions of debt, in each of which a demurrer was filed on the ground that debt would not lie to recover in such case. On the trial there was a motion by the defendant in each case for a directed verdict, on the ground that plaintiff had not proven nonpayment of the stock as-

sessments, or that the defendants owned the stock on which assessments were laid, or were the same persons shown in the books as owners of the stock.

"The appeals in the various cases present the following questions for our consideration: (1) Whether action can be commenced in the federal courts in Virginia by notice of motion under the Virginia statute without compliance with section 911 of the Revised Statutes (28 U. S. C. A., sec. 721); (2) whether service of notice of motion in accordance with the provisions of the Virginia statute is sufficient service to give a federal court in Virginia jurisdiction of the parties in an action so commenced; (3) whether debt is an appropriate form of action for the recovery of a stock assessment; and (4) whether the defendants were entitled to a directed verdict upon any of the grounds mentioned. We think that all of these questions must be answered in favor of the receiver.

"On the first question, it is clear that, as the commencement of an action is a matter of procedure, it is governed by the state practice. 28 U. S. C. A., sec. 724; Burns Mortgage Co. v. Fried, 292 U. S. 487, 54 S. Ct. 813, 79 L. Ed. 1380, 92 A. L. R. 1193. And here the practice prescribed by the state statute was clearly followed in all of the cases. It is argued that section 911 of the Revised Statutes (28 U. S. C. A., sec. 721), which requires all writs and processes issuing from the courts of the United States to be under the seal of the court and to be signed by the clerk, is applicable to the notice of motion under the statute of Virginia; but the answer to this is that the notice of motion is not a writ or process issuing from the court. The notice takes the place of the writ and declaration under the Virginia practice. Virginia Hot Springs Co. v. Schreck, 131 Va. 581, 109 S. E. 595; Security Loan & Trust Co. v. Fields, 110 Va. 827, 67 S. E. 342; Morotock Ins. Co. v. Pankey, 91 Va. 259, 21 S. E. 487. But it is not process emanating from a court and subject to the restrictive provisions relating to such process. Wood v. Kane, 143 Va. 281, 129 S. E. 327, 329; Kain v. Ash-

worth, 119 Va. 605, 89 S. E. 857. As said in Wood v. Kane, supra: 'A process emanates from a court, and under the provisions of section 6055 is usually directed to the sheriff of the county, while a notice, which takes the place of the writ and declaration, is directed to the defendants named therein, and has its emanation in the act of the plaintiff in sending it forth, and may be served by a layman.'

"The state of Virginia has seen fit to provide that, in lieu of the procedure followed in actions at law, a party entitled to maintain such action may proceed by motion before any court which would have jurisdiction of the action, upon giving 15 days' notice of the motion to the party against whom relief is asked. Code of Va. of 1930, sec. 6046. There is no reason why the state may not provide for action by the court upon notice of this character; for it is well settled that due process does not require any particular form or method of procedure. It is sufficient if reasonable notice and reasonable opportunity to be heard and to present any claim or defense are afforded; due regard being had to the nature of the proceeding and the character of rights which may be affected by it. State of Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 46 S. Ct. 384, 70 L. Ed. 82; Iowa Central R. Co. v. State of Iowa, 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467. And it would largely defeat the purposes of the Uniformity Act if the courts should hold the procedure under the notice of motion statute inapplicable to actions in the federal court. Letters of the clerk and deputy clerks of the District Court for the Eastern District of Virginia, appended to the brief of appellee, show that 95 per cent of the common-law actions instituted in Richmond in recent years, 33 1/3 per cent of those instituted at Norfolk, and 14 per cent of those instituted at Alexandria, have been commenced by notice of motion. 'The object of the statute was to simplify and shorten pleadings and other proceedings, to afford a more speedy remedy for the enforcement of contracts, and give suitors a plain and summary proceeding for the

recovery of judgments.' Burk's Pleading & Practice (2d Ed.) 222. The members of the bar have made wide use of the practice which it prescribes, and there is no reason why it should not be followed in the federal courts in accordance with the mandate of the Conformity Act.

"The late Judge McDowell went into this matter very fully in Leas & McVitty v. Merriman (C. C.) 132 F. 510, holding that the state practice established by the notice of motion of judgment statute should be followed under the Conformity Act and that section 911 of the Revised Statutes (28 U. S. C. A., sec. 721) was not applicable. The opinion in this case fixed the practice which has been followed in the federal courts of Virginia for more than 30 years; and we need do no more than refer to the opinion as a clear exposition of the law applicable in the premises. It has been followed by Judge McDowell in Schofield v. Palmer (C. C.) 134 F. 754; and by Judge (later Mr. Justice) Sanford In re Condemnation Suits by United States (D. C.) 234 F. 443, 448, and cited with approval by the Circuit Court of Appeals of the Ninth Circuit in Perris Irr. Dist. v. Turnbull, 215 F. 562, 564. In the Condemnation Suits Case in 234 F. 443, 445, Judge Sanford was dealing with proceedings in condemnation in which the owners of land were brought before the court by service of notice, and by publication as to nonresidents, as allowed by the statutes of Tennessee. It was objected that, because of the requirement of section 911 of the Revised Statutes (28 U. S. C. A., sec. 721), the proceeding should have been commenced by summons issued under the seal of the court and signed by the clerk. In upholding the proceedings under the Tennessee statute and holding that section 911 had no application, Judge Sanford said:

'I think it entirely clear, both upon principle and under the authorities, that in any original suit in a Federal court which must be commenced by a summons or other process of the court itself, such process must be signed by the clerk and issued under the seal of the court, to

be valid, regardless of any different provision as to the form of a summons in the State courts, the general conformity statute not operating to waive this specific requirement as to the process in the Federal courts embodied in section 911 of the Revised Statutes (28 U. S. C. A., sec. 721). Martin v. Criscuola, 10 Blatchf, 211, 16 Fed. Cas. 892 (No. 9,159); Peaslee v. Haberstro, 15 Blatchf, 472, 19 Fed. Cas. 71 (No. 10,884); Dwight v. Merritt (C. C.) 4 F. 614, 615; Middleton Paper Co. v. Paper Co. (C. C.) 19 F. 252, 253.

"'After careful consideration, however, I conclude that the provisions of section 911 only apply to writs and process issuing from the courts themselves, and not to notices given by the parties, which are not process of the court and not embraced within its terms, and hence that in any proceeding which may properly be instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of section 911 have no application.'" Eley v. Gamble, 75 Fed. (2d) 171, 172, 173.

This Procedure Approved by Text Writers.

"Under the conformity act (Rev. Stat., sec. 914; U. S. Comp. Stat. 1901, p. 684) an action may be instituted by notice under sec. 6046 in a Federal Court in Virginia in accordance with the State practice." Burks Pleading & Practice, Second Edition, p. 226.

"Interesting questions sometimes arise as to what is process within the meaning of this federal statute. Thus, is notice of motion for judgment, a practice obtaining in Virginia and many other states, process in this sense, so that it must conform to the federal statutory requirements? Judge McDowell, in a well considered opinion that is believed to be sound, has answered this question in the negative. And the same has been held as to notice given by the parties of the commencement of a proceeding for the condemnation of land." Dobie on Federal Procedure, p. 592.

"Action may be instituted by such notice (under Vir-

ginia Code, section 6046) in a Federal Court in Virginia in accordance with State practice." 4 Cyc. of Fed. Procedure, sec. 1203.

"Process included in the phrase 'modes of proceeding' used in the Conformity Act, and in the statute requiring that all writs and processes issuing from the federal courts shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof, in its narrowest sense means the writs and mandates of the court under the seal of the court, and so does not include mere notices of the parties given by the parties." 6 Hughes Fed. Practice 106, sec. 3584.

Citing the following cases:

"In re: Condemnation Suits by United States (D. C. Tenn. 1916), 234 F. 443; Leas & McVitty v. Merriman (C. C. Va. 1904), 132 F. 510."

"Those (process) issuing from the Supreme Court must bear teste of Chief Justice of the United States, or, when that office is vacant, of the Associate Justice next in precedence; and those issuing from the District Court bear teste of the judge, or when that office is vacant, of the clerk thereof. They must be signed by the clerk of the court, from which they issue. In this connection 'process' means the writ and mandate under the seal of the court, and does not refer to notices given by the parties, which are not the court's process." 6 Hughes Fed. Practice 325, sec. 3787.

Citing the following cases:

"In re: Condemnation Suits by United States (D. C. Tenn. 1916), 234 F. 443, holding that as condemnation suits, under the state statute, may be instituted upon mere notice, such proceedings are valid though the notices are not under the seal of the court and signed by the clerk."

For Federal cases on subject, see Appendix, pages 22-30.

For State cases on subject, see Appendix, pages 30-35.

For discussion of petitioner's authority to sue, see Appendix, pages 19-21.

CONTINUANCE OF CASE AS TO U. M. GENTRY'S ADMINISTRATOR NO ERROR

Nine living directors and the personal representatives of two deceased directors were sued by notice of motion jointly and severally for a stock liability of $22,000.00. The case was continued as to U. M. Gentry's Administrator on a plea of insanity which was not pleaded by anyone else. This was objected to by petitioners. See first ground of motion to set aside verdict Record page 24 paragraph one and Assignment of Errors page 26 paragraph 3.

The propriety of this was essentially a question of Virginia practice. This action was permitted by Judge Luther B. Way, a Virginia Judge of great experience, and approved by the Circuit Court of Appeals for the Fourth Circuit.

No objection was made to dismissing the case as to W. Worth Smith, who had secured his discharge, in bankruptcy or continuing as to P. B. Porter, J. P. Donnally and H. W. Porter's Administrator, who had filed pleas of bankruptcy and had not been granted their discharges. Record p. 23, just below middle.

This question is disposed of by Judge Parker in the opinion of the Circuit Court of Appeals, Record page 72, by quoting sections 6047 and 6265 of the Code of Virginia. Section 6047 is here quoted with the most pertinent parts italicized:

> "A person entitled to obtain *judgment for money* on motion may, as to any, or the personal representatives of any person liable for such money, move severally against *each, or jointly against all, or jointly against any intermediate number;* and when notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with the notice, *but the judgment against such personal representative shall, in all cases, be several.* Such motions may be made from time to time until there is

judgment against every person liable, or his personal representative."

It will be observed that this section covers a notice of motion for money due, on contract, tort or otherwise. It provides for judgment against one or any intermediate number. It is also respectfully called to the Court's attention that this section requires the judgment to be *several* as to the *personal representative of a decedent.* Section 6265 of Virginia Code quoted in the opinion of the Circuit Court of Appeals (R. 73) permits judgment on joint contracts or joint and several contracts against any one or any intermediate number and permits the plaintiff to dismiss or proceed to judgment as to any so served. Numerous authorities sustaining this position could be added, but it is not believed that this Court will review a matter of local practice approved by the District Court and the Circuit Court of Appeals, and about which there appears to be no question.

Under this point it is said by the Circuit Court of Appeals that the liability of a stockholder in a national bank for an assessment levied by the Comptroller is contractual. Petitioners stated in their brief in the Circuit Court of Appeals that it was statutory. Counsel for respondents agreed with this statement, and therefore did not proceed to argue it although they had prepared a brief on the point to argue in the Circuit Court of Appeals in another case. The Circuit Court of Appeals referred to the cases of Richmond v. Irons, 121 U. S. 27 and Matteson v. Dent, 176 U. S. 521, but did not refer to McClaine v. Rankin, 197 U. S. 154 and subsequent cases holding the liability statutory. We submit, however, that, so far as this case is concerned, it is immaterial whether the liability was statutory or contractual.

LIABILITY OF JOINT ADVENTURERS OR PARTNERSHIP FOR STOCK ASSESSMENT

We do not dispute the statement that generally speaking the responsibility of share holders is individual and statutory, not contractual and joint, made on page 32 of Appellants' brief. We think the liability is always statutory and is always several except where the ownership is joint in which case the partnership or joint adventurers are necessarily jointly and severally liable for the stock which they jointly own.

The joint nature of the purchase and ownership of this stock was fully established by the evidence to the satisfaction of the trial court and also to the satisfaction of the Circuit Court of Appeals by the testimony of the defendants against whom the joint judgment was entered. See opinion of the Circuit Court of Appeals (R. 73 to 78). Also opinion of the trial Court (R. 58 to 62).

It has never been denied as far as we know that a partnership or joint adventure may purchase stock in a national bank. If they do they are of course jointly and severally liable for the stock assessment as they would be for taxes on the stock or any other debt of the joint adventure or partnership. This was expressly held in English v. Gamble (C. C. A. 8th) 26 Fed. (2d) 28, and also in this case by the Circuit Court of Appeals for the Fourth Circuit. This is a matter about which there is no difference of opinion in the different Circuits. See opinion of Circuit Court of Appeals in this case (R. 76 to 78).

COURT'S ACTION IN DIRECTING A VERDICT

In this case the defendants first moved for a directed verdict at the conclusion of the plaintiff's evidence and renewed their motion for a directed verdict at the conclusion of all of the evidence. See opinion of the Circuit Court of Appeals, Record page 71 and opinion of the trial Court, Record pages 57 to 58. The effect of a motion for a di-

rected verdict and nothing more by the defendants was a waiver of the jury so far as they were concerned. They did not try to waive the jury upon condition that the Judge should decide in their favor. Having asked for a directed verdict, which was a waiver of the jury they could not be heard to complain of the Court's action in directing the verdict for the plaintiff, if there is sufficient evidence to sustain such a verdict. Judge Parker of the Circuit Court of Appeals said in the opinion in this case, Record page 73:

> "Coming to the merits of the case, we note that at the conclusion of the testimony both sides moved for a directed verdict. It is well settled that this amounts to a waiver of jury trial and a consent that the trial judge decide the issues and direct a verdict accordingly; and in such case, upon exception to an adverse finding and direction, the only question is whether the verdict as directed is supported by substantial testimony. In other words, the verdict must stand unless the party against whom it has been directed was entitled to have it directed in his favor. Williams v. Vreeland, 250 U. S. 295; Sena v. American Turquoise Co., 220 U. S. 497, 501; Beutell v. Magone, 157 U. S. 154; Barringer v. Dinkler Hotels Co. (C. C. A. 4th) 61 Fed. (2d) 82, 83; Swift & Co. v. Columbia Ry. Gas & Electric Co. (C. C. A. 4th) 17 Fed. (2d) 46, 49; Lawton v. Carpenter (C. C. A. 4th) 195 Fed. 362. The only question left for our determination, therefore, is whether, upon the evidence, defendants were entitled to a directed verdict. We agree with the judge below that they were not."

We agree that some of the defendants sometimes testified that they individually bought an undivided one-eleventh interest in the stock but they all testified to facts which when proved established a joint adventure. See the summary by the trial Judge (R. 59 and 61). But the questions to and answers of L. P. Chisholm, the only real defendant in this case, on page 35 would establish a joint adventure. See also the testimony of L. P. Chisholm on page 38.

W. E. Crank, Commonwealth Attorney and one of the defendants, (R. 52) testified he "never expected to pay anything on the note except interest" referring to the joint note given for the purchase. He also testified on page 52, "no plan as to ultimately dividing any stock among the directors and issuing individual certificates . . . bought it for the purpose of reselling it." The manner of buying and holding the stock was well described by W. Worth Smith, Jr., State senator and a lawyer of experience on page 54 of the Record, as follows:

> "Mr. Donnally figured the liability for each on the note of one-eleventh and they were buying stock in proportion to their liability on the big note; he never felt he owned any of the stock . . . the purpose of taking all the stock in one block was to get the money and to sell the stock immediately and closed out the transaction as far as the Government was concerned; get all the money at one time and not wait until the stock could be sold to Tom, Dick and Harry throughout the county; during that time they were simply financing it with no intention on the part of anybody to increase their individual holdings and it was put in the name of J. P. Donnally, Trustee solely for the purpose of convenience in distribution among the prospective ultimate holders; while it was never discussed, it was his idea that any sales were to be off the whole block and Donnally was not to sell any individual's stock; the object of taking the stock in this way was not that the named persons would eventually become the owners, but the purpose was to distribute it through the sections; the eleven named persons were a sort of avenue of distribution of the stock; he had ten shares before and would not assume a liability of $60,000.00 to get a profit on ten shares."

As the petitioners have not argued either in their petition for certiorari or in the brief in the Circuit Court of Appeals their objections to the admissibility of evidence, we do not feel that we should further notice their objec-

tions. Their principal objection was to showing that the defendants whom the Court held were joint adventurers borrowed the entire purchase price of the stock on a joint note and that a joint judgment had been recovered against them on the note. The manner of raising the purchase money was so closely connected with the purchase of the stock that the priority of connecting the two is self evident.

Respectfully submitted,

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APPENDIX

Virginia Code, Section 6046

"Remedy by motion after fifteen days' notice, in lieu of action at law; when notice to be returned to clerk's office; rules applicable to.—Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion, before any court, which would have jurisdiction of such action, after not less than fifteen days' notice, which notice shall be in writing, signed by the plaintiff or his attorney, and shall be returned to the clerk's office of such court, within five days after service of same, and when so returned shall be forthwith filed and the date noted thereon, and shall be docketed on the return day thereof. But the notice shall not be sent out of the county or city in which the judgment is to be asked, except in those cases in which process can be so sent out under the provisions of section six thousand and fifty-five and six thousand and fifty-six. The return day of a notice under this section shall not be more than ninety days from its date, unless the commencement of the next succeeding term of court be more than ninety days from such date, in which case the return day may be some day of such term.

"The defendant may make the same defenses to the notices as to a declaration in any action at law, and in the same manner, or he may state his grounds of defense informally in writing, and in the latter event the parties shall be deemed to be at issue on the grounds stated without replication or other pleading on the part of the plaintiff. No plea in abatement under this section shall be received after the defendant has demurred, pleaded in bar or filed such statement of his grounds of defense. An action shall be deemed brought on the day on which such notice is executed, if such notice be subsequently returned to the clerk's office to which same is returnable within the time herein prescribed, and the execution thereof shall stop the

running of the statute of limitations on the claim mentioned therein.

"If the motion be upon an account, the plaintiff shall file with the notice an account, stating distinctly the several items of his claim, unless they be plainly described in the notice, and if the plaintiff file with such account an affidavit, such as is prescribed by section sixty-one hundred and thirty-three, on the part of the plaintiff, in an action of assumpsit, no plea in bar or defense to the merits shall be received on the part of the defendant, unless accompanied by such affidavit as is prescribed by the last mentioned section on the part of the defendant in an action of assumpsit. If such plea and affidavit be not filed by the defendant, the plaintiff shall, upon motion made in open court, be entitled to a judgment for the amount claimed in the affidavit filed with his notice, and no further proof of the plaintiff's claim shall be necessary. If such plea of defense and affidavit be filed and the affidavit admits that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit by the plaintiff, judgment may be taken by the plaintiff for the sum so admitted to be due, and the case be tried as to the residue.

"Upon any motion under this section the same rules shall apply, with reference to bills of particulars and grounds of defense, as are now provided by law in other actions or motions.

"In the event the return day of any notice given under the provision of this section, should happen to be a day of the term on which the court did not sit, or a day after the final adjournment of a term, such notice shall not be lost, but shall be deemed matured for hearing on the first day thereafter of the same term on which the court sits or the first day of the next regular term of the said court, as the case may be, and shall be docketed on that day by the clerk."

PETITIONERS' AUTHORITY

From page 21 to 24 are a group of Circuit and District Court decisions from New York and Wisconsin holding that under the practice of those two States attorneys could not sign process in a Federal Court to institute proceedings. But section 721 of the Judicial Code is held by the United States Courts in Virginia, Iowa and Tennessee including the Circuit Court of Appeals for the Fourth Circuit (Leas & McVitty v. Merriman, 132 Fed. 510, Virginia District Court In re: Condemnation Suits by the United States, 234 Fed. 43, Tennessee District Court, Wile v. Cohn, 63 F. 159, Circuit Court Iowa and Eley v. Gamble, 75 F. (2d) 171 (C. C. A. 4th Circuit) not to apply to a notice of motion for judgment in these States which is not process.

Many State Courts have held that State Constitutional provisions about the commencement and conclusion of process do not apply to notice of motion similar to that used in Virginia.

Hammond-Chandler Lumber Co. v. Industrial Commission (1918) 158 N. W. 292, 294, 163 Wis. 596.

Comet Consolidated Min. Co. v. Frost (1890) 25 Pac. Rep. 506, 507, 15 Colo. 310.

Lane v. Ball (1916) 160 Pac. 144, 148, 149, 83 Ore. 404.

State Chilean County v. Superior Ct., 253 Pac. 115, 119, 142 Wash. 270 (1927).

Herndon v. Wakefield-Moore Realty Co., 79 So. 318, 319, 143 La. 724 (1918).

McKenna v. Cooper, 101 Pac. 662, 663, 79 Kan. 847 (1909).

Brooks v. Nevada Nickel Syndicate, 53 Pac. 597, 599, 24 Nev. 264 (1898).

No. Pac. Ry. Co. v. Jurgenson, 141 N. W. 70, 71, 25 N. D. 14 (1913).

Hanna v. Russell, 12 Minn. Rep. 43, 45 (1882).

Burns v. Pittsburg Mortgage Inv. Co., 231 Pac. 887, 889, 105 Okla. 150 (1924).

Gilmer v. Bird, 15 Fla. Rep. 410, 421, 422, 423 (1875).

Nichols v. Burlington & Louisa County Plank Road Co., 5 Iowa Rep. (4 Greene) 42, 43 (1853).

The two United States Supreme Court cases cited on page 25 of Petitioners' brief, Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931, 932 and Boswell v. Otis, 9 How. 336, 348, 13 L. Ed. 164, 169 do not have the remotest bearing on the subject. For instance in Boswell v. Otis, there was an attachment against a non-resident. The quotation, if taken to mean that jurisdiction could only be acquired in one of two modes would prevent a Court from acquiring jurisdiction from voluntary appearance.

ERRONEOUS OR MISLEADING STATEMENTS OF LAW

No authority is cited for the statement on page 26 that the District Court could only acquire jurisdiction of the defendant by a process issued by the District Court.

There is a quotation from Hughes Federal Procedure (2d Ed.) on page 26. The Court's attention is respectfully called to the fact that this was a one volume work in 1913 issued by the West Publishing Company as one of its horn book series. This small volume only about one inch thick could not cover all the matters, but see Hughes 1931 Federal Practice, section 3584 where a statement to the contrary is found.

The quotation from Hughes 6th edition, section 3584 found on page 27 is incomplete, in that it omits the first part of that section which reads as follows:

> "'Process,' included in the phrase 'modes of proceeding' used in the Conformity Act, and in the statute requiring that all writs and processes issuing from the federal courts shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof, in its narrowest sense means the writs and mandates of the court under the seal of the court, *and so does not include mere notices of the parties given by the parties.* No form of process is provided for the courts of the United States by any act of Congress now in force." Hughes Federal Practice Jurisdiction & Procedure, sec. 3584, p. 106. (Italics ours.)

We thoroughly agree with the quotation from the Hot Springs Co. v. Schreck, 131 Va. 581, which says that the notice "takes the place of the writ." It will be observed that this is a holding that the notice is not a writ. No authority is cited for the statement at the bottom of page 27 that the case of Eley v. Gamble, 75 Fed. (2d) 171 is in conflict with the decision of other Circuit Courts of Appeal. The brief does not refer to the other Circuit Courts of Appeal anywhere by name and citation, and we have been unable to find them.

The case of Eley v. Gamble, 75 F. (2d) 171, holds that it is not in conflict with the District and Circuit Court decisions cited by petitioner from Wisconsin and New York.

Section 503, Title 28, does not forbid the marshal to serve other papers.

ERRONEOUS STATEMENT OF FACTS IN PETITIONERS' BRIEF

We wish to take issue with the statement on page 38 of defendants' brief:

> "None of the other defendants or parties to the agreement to purchase the stock testified, and the Receiver offered no evidence of any other person who was present and made the agreement of each to buy."

We first put on L. P. Chisholm, who is for practical purposes, the only defendant, and one of the other Directors, and proved our case by them, except for formal matters, such as the assessment by the Comptroller, appointment of Receiver, etc., which were proved by the Receiver. In the case all of the living Directors who bought the stock were examined. The only two that were not, were made parties defendant through their personal representatives. There was naturally no evidence of what took place at the Directors meeting, other than the evidence of the living Directors. We deny the further statement on page 38 that J. P. Donnally's report to the Comptroller's office of the stockholders of the Bank "showed the shares of stock

which each of the defendants had purchased was an undivided one-eleventh interest."

The record shows on page 43 that J. P. Donnally testified:

"Witness further testified that in July of the years 1931 and 1932, he filed in the Comptroller's office, as required by statute, a report of the stockholders of the Bank, which showed the 220 shares in his name as Trustee and no more."

This is very different from the quotation on page 38 of Petitioners' brief.

DECISIONS

Federal Cases

Prior to 1904 there were four circuit court decisions and one District court decision to the effect that process must conform to section 721 of the United States Code. The latest of these appear to be 50 Fed. Since the decision of Judge McDowell in Leas & McVitty v. Merriman, 132 Fed. 510, these old cases do not appear to have been applied to private notices.

In 1904 this question was raised before Judge McDowell, a very distinguished judge of the Western District of Virginia. Judge McDowell handed down a very carefully considered opinion, September 22nd, 1904, which has been since followed and approved and has never so far as we can learn, been even criticized by any court. As the entire opinion is devoted exclusively to the one point before us, it is very hard to do much less than copy the decision in this case. There was a proceeding by notice of motion under section 3211 of the Code of 1887, now section 6046:

". . . Upon the calling of the case the defendant's counsel moved that the motion be dismissed on the ground that the notice was not under the seal of the court and not signed by the clerk of the court. The argument is based on section 911, Rev. St. (U. S. Comp. St. 1901, p. 683) (section 721 U. S. Code):

"'All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from . . . a Circuit Court shall bear teste of the Chief Justice. . . .'

"The question thus raised is in this state of much practical importance. Not only are there many such motion cases, but by section 2732 (now 5461) of the Code of Virginia of 1887 actions of ejectment may be instituted only by a notice given the defendant, to which is attached a copy of the declaration, advising him when and where the declaration will be filed. The practice under this statute has always been that the plaintiff's attorney prepares, signs, and has served the notice, whether the action is brought in the state courts or in the federal courts in this state. There is no rule of this court bearing on the question. Were it not for some decisions to be adverted to later I should feel justified in overruling this motion without discussing the question. The language used in section 911 (now 721), Rev. St., seems to me to show clearly that it has no relation to such a case as is here presented. However, because of the decision above mentioned, it is perhaps advisable to enter upon a discussion of the question." . . .

Here Judge McDowell refers to the older cases upon the subject.

"I have reached the conclusion that section 911 does not apply here and for the following reasons:

"(1) On its face this statute applies only to writs and processes issuing from the federal courts. In no sense do the notices we have under consideration 'issue' from the court. The ground for the motion by defendant in the case at bar is highly technical, and could properly be met by a somewhat technical reason for overruling it. But I am not satisfied that this reason is only technical. If the language of this statute can be rightly held to apply to the notices here in question, it could also be held to apply to all the various notices

given in the course of litigation in the federal courts. The statute is, most properly, not confined to documents which are used merely to institute a litigation.

"(2) I think section 911 (721), Rev. St. (U. S. Comp. St. 1901, p. 683), means no more than that when a writ or process issues from a federal court it must be signed by the clerk, and shall be authenticated in the manner therein set out. It is not an ordinance to the effect that no action or proceedings in a federal court shall be instituted except by the issue of process, signed by the clerk, duly sealed, etc.

"(3) Notices in ejectment under section 2732, Code Va. 1887, and notices of motion for judgment under section 3211 are not, as it seems to me, 'processes.' To my mind, the word 'process,' as used in Rev. St. Sec. 911 (721), means an order of court, although it may be issued by the clerk. The summons in a common-law action, which is, I think, a 'process,' in the name of the court commands the sheriff or marshal to summon the defendant, etc. Johnston's Forms, p. 1. The writs of scire facias, fieri facias, habeas corpus, subpoenas for witnesses, subpoenas duces tecum, writs of certiorari, supersedeas, attachments, and of venire facias are all commands or orders of court that something be done. In equity the writ of subpoena, and in criminal cases the bench warrant, command that something be done. Now, the notices under the Code are are in no sense commands or orders of court. They are mere notices that the plaintiff will on some specified rule day file the declaration, or make a motion in court. They sometimes are, and may always be, prepared, signed, and issued by the plaintiff in person. No rule of practice requires that an attorney shall sign or issue them. They do, it is true, subserve the purposes of processes. But they are not technically processes, and are not necessarily embraced within that term as used in section 911 (721).

"In several of the states a summons in an action may be issued by the plaintiff's attorney. See 19 Am. & Eng.

Ency. (1st Ed.) p. 222, notes and cases cited supra. And in at least the majority of such cases it is held that a summons is not a process. This conclusion is based on the fact that in such states the summons is not issued by the court, and is not an order of court. If such reasoning have any soundness, it applies much more forcibly to the notices we are considering.

"In Whitney v. Blackburn, 17 Or. 564, 21 Pac. 874, 11 Am. St Rep. 857, it is said:

'Properly speaking, a summons is only a process when issued from the office of a court of justice requiring the person to whom it is addressed to attend the court for the purpose therein stated. Under our Code the summons is a process to commence a civil action. But technically, such a summons is not a "process," but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer the complaint therein within a specified time. In view of this distinction, such notice cannot be considered process in the sense in which that word is used in the books.'

"(4) If we read into section 911 (721), Rev. St., a requirement that notices in ejectment and of motions for judgment are to be treated as processes to be issued by the clerk under seal, we have created a repugnance between sections 911 (721) and 914 (724), Rev. St. This is to be avoided. If one of two reasonable readings of the statute law creates, and the other avoids, a repugnance, the latter should be adopted.

"(5) While the language above quoted from Shepard v. Adams, 168 U. S. 618, 824, 18 Sup. Ct. 214, 216, 42 L. Ed. 602, seems prima facie to indicate that a paper serving the purpose of process from the federal court must always conform to section 911 (721), Rev. St., still the entire opinion is somewhat in confirmation of the opposite conclusion. It seems to give much weight to section 914 (724), Rev. St., and

the inference is that, where there is no rule of the federal court on the subject a state statute authorizing a summons to be issued by plaintiff's attorney would control in the federal court. The prototype of section 911 (721) was enacted in 1789 (Act Sept. 29, 1789, c. 21; 1 Stat. 93. See, also, Act May 8, 1792, c. 36; 1 Stat. 276); the conformity act (section 914 (724)) at a much later date (Act June 1, 1872, c. 255, 17 Stat. 197). The purpose of this later statute was to secure conformity in civil law causes, subject to a reasonable discretion in the federal courts, in matters of practice, pleading, and 'forms and modes of proceeding.' Where the state statute authorizes the plaintiff or the plaintiff's attorney to issue not a summons, but a notice, as a method of instituting a litigation, reasonably full effect is denied the conformity statute if we hark back to act of 1789 for authority for saying that such state statute does not govern in common-law civil causes in the federal courts of such state, in the absence of any rule of court on the subject.

"The motion of defendant is overruled." Leas & McVitty v. Merriman, 132 Fed. 510.

This case has never been overruled or disapproved by any court so far as we can find.

It was followed in Schofield v. Palmer, 134 Fed. 753 and In Re: Condemnation Suits, 234 Fed. 443. Cited with approval In Re: Pieris Irr. Dist. v. Turnbull, 215 Fed. 562 and In Re: Simon, 297 Fed. 942.

The notice of motion statute in Virginia has been construed on several occasions by the courts of this District and by the Circuit Court of Appeals of this District. See New River Mineral Company v. Roanoke Coal & Coke Co., 49 C. C. A. 78, 110 Fed. 343. Schoefield v. Palmer, 134 Fed. 753. Shugart v. Crews, 171 C. C. A. 72, 260 Fed. 36.

This decision of Judge McDowell has been relied on by the bench and bar in the State of Virginia for thirty years. To question it at this time would be to throw doubt upon

the validity of probably more than fifty per cent of the recent judgments by default in the Federal Courts of Virginia.

It would also in effect so far as Virginia is concerned nullify the Conformity Act, section 724, because the lawyers of Virginia are familiar with the procedure by notice of motion and habitually use it. The fundamental purpose of 724 is to permit lawyers in the State to use the procedure with which they are familiar.

In a number of condemnation proceedings in the Eastern District of Tennessee under section 724, they gave notice as provided by the state practice. Objection was made that they were void because process was not issued signed by the Clerk and under the seal of the court.

> "In several proceedings instituted by the United States and now pending in this court for condemnation of lands under the provisions of the Weeks Law of March 1, 1911, c. 186, 36 Stat. 961 (Comp. St. 1913, sec. 5174-5187), the United States Attorney and various counsel representing claimants to the land have informally requested the opinion of the court as to the validity of the proceedings, arising out of a doubt which has been suggested as the jurisdiction of the court by reason of the fact that no summons have been issued and served upon the owners of the land, but they have been brought before the court, if at all, by mere service of notice and publication as to nonresidents, in accordance with the provisions of the general statutes of Tennessee in reference to condemnation proceedings.
>
> "(1) The Act of August 1, 1888, c. 728, 25 St. 357, authorizing the condemnation of land by the United States for public uses by condemnation under judicial process in proceedings in the Circuit or District Courts of the district wherein such real estate is located, provided, in section 2, that:
>
> 'The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act

shall conform, as near as may be to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding.'

"This provision as to conformity to the State practice is, it is to be noted, in substantially the same terms as the provisions of the general conformity statute, embodied in section 914 of the Revised Statutes (Comp. St. 1913, sec. 1537).

"The general statute of Tennessee in reference to the condemnation of land for railroads and other works of internal improvement, provide that the party seeking to appropriate such land shall file a petition therefor in the circuit court of the county in which the land lies (Tenn. Code 1858, sec. 1326; Shan. sec. 1845); that notice of this petition shall be given to the owner of the land, or if a nonresident of the county, to his agent, at least five days before its presentation (Code 1858, sec. 1327; Shan. sec. 1846); that if the owner is a nonresident of the state or unknown, notice shall be given by publication, as provided in the Code in similar cases in chancery (Code, sec. 1328; Shan. sec. 1847); and that 'all parties having any interest in any way in such land may be made defendants, and the proceedings will only cover and affect the interest of those who are actually made parties' (Code, sec. 1328; Shan. sec. 1848). This statute makes no provision for bringing the owners of the land before the court in any other way than by notice and publication, as above set forth, and does not provide for the issuance of process against them in the ordinary sense, such proceedings being under the State law an exception, by necessary inference, to the general statutory provision that all civil actions at law in courts of record, except as otherwise provided, shall be commenced by summons. Tenn. Code, Sec. 2813; Shan. sec. 4318. Thus in Camp v. Railroad, 11 Lea (Tenn.) 705, 706, it was held that condemnation proceedings based alone upon the statutory notice, without sum-

mons, were valid, and that the general Code provisions as to pleadings in actions at law did not apply to such statutory proceedings.

"The doubt which has been suggested as to the validity of these proceedings arises from the fact that section 911 (721) of the Revised Statutes (Comp. St. 1913, sec. 1534) provides that 'all writs and process issued from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof;' the suggestion being that under this provision these proceedings should have been commenced by summons to the owners of the land, issued under the seal of the court and signed by the clerk.

"I think it entirely clear, both upon principle and under authorities, that in any original suit in a Federal court which must be commenced by a summons or other process of the court itself, such process must be signed by the clerk and issued under the seal of the court, to be valid, regardless of any different provision as to the form of a summons in the State courts, the general conformity statute not operating to waive this specific requirement as to the process in the Federal courts embodied in section 911 (721) of the Revised Statutes. Martin v. Criscuola, 10 Blatchf. 211, 16 Fed. Cas. 892; Peaslee v. Haberstro, 15 Blatchf. 472, 19 Fed. Cas. 71; Dwight v. Merritt (C. C.) 4 Fed. 614, 615; Middleton Paper Co. v. Paper Co. (C. C.) 19 Fed. 252, 253.

"After careful consideration, however, I conclude that the provisions of section 911 (721) only apply to writs and process issuing from the courts themselves, and not to notices given by the parties, which are not process of the court and not embraced within its terms, and hence that in any proceeding which may be properly instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of section 911 (721) have no application. This is in accordance with the principle of Leas v. Merriman (C. C.) 132 Fed. 510, in which it was held that the provisions of sec. 911 (721)

did not apply to a notice given under the Virginia Code authorizing a judgment on a contract to be obtained on motion after notice to the defendant and the practice thereunder by which notice was served on the defendant by the plaintiff or his attorney, such notice not being a process from the court, and that under the general conformity statute an action might be instituted by such notice in the Federal court in Virginia in accordance with the State practice." In Re, Condemnation Suits by United States, Eastern District of Tenn. March 30, 1916; 234 Fed. 443.

"Process—What Constitutes—Notice of the Garnishment. Rev. St. sec. 915 gives plaintiff, in common law causes in the United States Circuit Court remedies by attachment or other process against the defendant's property, similar to those provided by the state statutes. Code Iowa sec. 2962, provides that the clerk shall issue the writ of attachment. Sec. 2967 provides that property of the defendant held by a third person may be attached by giving the latter notice of attachment. Sec. 2975 as amended by Laws 18th General Assembly, 58, provides that garnishment is effected by informing the supposed debtor that he is attached as garnishee, and leaving written notice not to pay any sum due, or deliver the property to defendant, etc., there is no provision in the Revised Statutes or Iowa Code requiring either of such notices to proceed from the clerk. *Held,* that a notice to the garnishee is not a 'process' within Rev. St. sec. 911, relating to process, and that such notice in actions in the United States Circuit Court in Iowa is properly signed by the marshal, and need not bear the seal of such court or the teste of the chief justice of the United States." Wile v. Cohn (1894), 63 Fed. Rep. 759 (Syllabus) (Cir. Ct. Iowa, Sept. 17, 1894).

State Cases

There are numerous State decisions that statutory and constitutional provisions which require process to be

signed and sealed by the Clerk or issued in the name of the State such as U. S. Code, sec. 721 and Va. Constitution, sec. 106 and have no application whatever to citations or notices given by parties or their attorneys similar to those given under section 6046 of Virginia Code. A few of the State decisions quoted from are as follows:

> "A summons is not a process—it is a mere statutory notice. Rahn v. Cunnison, 12 Wis. 528. The summons in this case was regular, in every way except for not being signed by Wisconsin attorneys with their address specified." Hammond-Chandler Lumber Co. v. Industrial Commission (1916) 158 N. W. 292, 294, 163 Wis. 596.

> "As to the first point raised that the summons is such a process as must be issued in the name of the people of the State of Colorado, we are strongly inclined to follow the conclusion of the supreme court of Florida in Gilmer v. Byrd, 15 Fla. 411. In this case the identical question here presented is discussed at some length—that is, that the summons, as authorized by the Code is a 'process' within the meaning of the constitutional provisions which require the style of all process to be the 'State of Florida;' that the summons had no style; that this was essential to the validity of the judgment, there having been no appearance. And the Court said: 'But is a notice given by an attorney of the institution of a suit in a form similar to a summons but not issuing out of a court, a "process" within the meaning of the constitutional?' Baron Comyn in giving the definition of the term 'process' says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of 'process' given by any accepted authority which implies that any writ or method by which a suit is commenced is necessarily 'process.' A party is entitled to notice and to a hearing under the constitution before he can be affected but it is nowhere declared or required that that notice shall be only a writ issuing out of a court." Porter v. Vandercook, 11 Wis. 70, it

was held that "the summons provided for by the Code is not a 'writ' or 'process' within the meaning of the constitution, art. 7, sec. 17, and need not be in the 'name of Wisconsin' nor tested in the name of the presiding judge, nor sealed with the seal of the court. In Hanna v. Russell, 12 Minn. 80 (Gil. 43) the Court said: 'But we think a 'summons' is not a 'process' within the meaning of sec. 14, art. 6 of our State Constitution. It is merely a notice given by plaintiff's attorney to the defendant that proceedings have been instituted and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it 'process' for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complainant without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him.' Bailey v. Williams, 6 Or. 71, it was held that 'a summons used to bring a defendant into the circuit court is not a 'process' and need not run in the name of the state.' In Nichols v. Plank Road Co., 4 G. Greene, 44, it was held that 'the notice provided by the Code is not a 'process' and need not be in the style of the 'State of Iowa.' This seems to be the generally accepted conclusion of all courts having a similar Code practice and a similar provision in the constitution, and is, in our judgment a satisfactory determination of this question." Comet Consolidated Min. Co. v. Frost (1890) 25 Pac. Rep. 506, 507, 15 Colo. 310.

"A summons issued by the plaintiff or his attorney in an action instituted in a court of record in Oregon is not a 'process' within the meaning of that word as used in our Code. L. O. L. sec. 1368; Bailey v. Williams, 6 Or. 71; Whitney v. Blackburn, 1 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857, 862.

"The cases thus relied upon are not controlling in Oregon where a summons issued in an action instituted in

a court of record is not process, nor more than a mere notice to the defendant upon whom it is served." Lane v. Ball (1916) 160 Pac. 144, 148, 149, 83 Or. 404 (Sup. Ct. Ore. 1916).

"Two other questions are urged by respondents (a) that the Court did not acquire jurisdiction; and (b) that the notice was insufficient.

"As to the first it was urged that since the notice to respondents did not run in the name of the State of Washington, and that by Article 4, sec. 27 of the State Constitution, all process is required to be in the name of the State of Washington the notice was ineffectual to give jurisdiction. An elaborate arrangement on this point is pressed upon us to show that the notice herein is process within the meaning of the Constitution. But we think it unnecessary to enter into a review of the question, since we have heretofore held that a summons in a civil action is not process, and we think the notice given herein stands on no higher plane. Wagnitz v. Ritter, 31 Wash. 343, 71 Pac. 1035; Spokane Merchants Assn. v. Acord, 99 Wash. 674, 170 Pac. 329, 6 A. L. R. 835; St. ex rel. Hazen v. Superior Court (Wash.) 247 Pac. 942." State Chilean County v. Superior Ct., 253 Pac. 115, 119, 142 Wash. 270 (Sup. Ct. Wash. 1927).

"Besides, citation is not 'process' within the intendment of said article of the Constitution. Bludworth v. Sompeyrac, 3 Mart. (O. S.) 719." Herndon v. Wakefield Moore Realty Co., 79 So. 318, 319 (Sup. Ct. La. 1918) 143 La. 724.

Note.—This was the commencement of a condemnation proceeding where it was claimed the citation did not conform to the requirements for process.

"In some states the original summons to the defendant in an action is a mere notice by the plaintiff's attorney; and hence is not process in the sense of constitutional or statutory provisions prescribing the style and requisites of process.

"But we think a summons is not process within the meaning of section 17, art. 3, of our State Constitution. It is merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted, and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court, or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove its process, for it is competent for the Legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him. 'Process, in a large acceptation, is nearly synonymous with proceedings, and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. 7 Comyn's Dig. 120; 3 Black. Com. 279 et seq.; Bouvier's Law Dic. In this last sense it is manifestly used in the Constitution and, when used in this sense, we believe it only applies to judicial instruments issued by a court or other competent jurisdiction and returnable to the same.' Hanna et al. v. Russell et al., 12 Minn. 80 (Gil. 43). The meaning of the Constitution of Illinois, which provides that all process shall run in the name of 'The People of the state of Illinois,' is thus explained. 'This object is manifest. It was to provide a name or title by which the sovereign power of the state should be designated. In England the king is supposed to be the fountain of justice and the source of power, and that sovereign power is there designated by his name and title. In Kentucky, and some of the other states, it is the 'commonwealth,' in Missouri and some others it is the 'State.' Here it is the 'People,' etc. Where, by the law of England, whence we have mainly borrowed our system of jurisprudence, writs or process are issued, or other proceedings are had expressly in the name of the king, here they should run in the name of

'The People.' The latter is to be used instead of the former. The meaning is not that everything shall be done expressly in the name of 'The People' but that nothing shall be done in any other name. Whenever the name of the sovereign power is invoked or expressed, that shall be its designation.' Curry v. Hinman, 11 Ill. 420. See, also, Leas & M'Vitty v. Merriman (C. C.) 132 Fed. 510; Gilmer v. Bird, 15 Fla. 410; William Tweed v. Horace Metcalf, 4 Mich. 579; Case Mfg. Co. v. Perkins, 106 Mich. 349, 64 N. W. 201; Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. 1124; Brooks v. Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Bailey v. Williams, 6 Or. 71; Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906; Porter v. Vandercook and others, 11 Wis. 70.'' McKenna v. Cooper, 101 Pac. 662, 663, 79 Kan. 847 (Sup. Ct. Kan. 1909).

''In this case the identical question here presented is discussed at some length—that is, 'that the summons, as authorized by the Code, is a 'process,' within the meaning of the constitutional provisions which require the style of all process to be, the 'State of Florida;' that the summons had no such style; that this was essential to the validity of the judgment, there having been no appearance,' and the court said: 'But is a notice given by an attorney of the institution of a suit, in a form similar to a summons, but not issuing out of a court, a 'process' within the meaning of the constitution? Baron Comyn, in giving the definition of the term 'process' says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of 'process,' given by any accepted authority, which implies that any writ or method by which a suit is commenced is necessarily 'process.' A party is entitled to notice and to a hearing, under the constitution, before he can be affected, but it nowhere declared or required that the notice shall be only a writ issuing out of a court. Mining Co. v. Frost, 25 Pac. 506; Hanna v. Russell, 12 Minn. 80 (Gil. 43); Bailey v. Wil-

liams, 6 Or. 71; Nichols v. Plank-Road Co., 4 G. Greene, 44." Brooks v. Nevada Nickel Syndicate (1898) 53 Pac. 597, 599 (Sup. Ct. Nev. 1898) 24 Nev. 264.

"As was stated at the outset, this summons was signed by the attorney, as permitted by the statute, and thereby F. C. Erdman was given notice of the pendency of the suit. The notice accomplished its purpose, and brought the right man into court, who moved to quash it. There is no question concerning the right to amend a writ because a summons signed by an attorney is not a process, but a notice under the code, or a proceeding, as perhaps it might be more accurately termed, whereby the person who is named as a defendant is brought into court to defend the action. Mining Co. v. Frost, 5 Colo. 310, 25 Pac. 506." Erdman et al. v. Hardesty (1900) 60 Pac. 360, 361, 14 Colo. App. 395 (Sup. Ct. Colo. 1900).

"Writs are issued by the court through the clerk. Orders to show cause, under our practice, are signed by the judge. This order was signed by the judge. The practice in this state has long been established, and justifies the initiations of the proceeding through an order to show cause of the character of the one here involved. Such orders to show cause have been issued repeatedly by this court in various special proceedings, and have, so far as we are aware, never run in the name or style of the state of North Dakota. When writs have been issued, they have been issued by the clerk upon the order of the court; but orders to show cause have invariably been signed by a member of the court. It is true the order to show cause often contains some of the same provisions found in an alternative writ, but ordinarily an order to show cause is only another name for a notice and another method of submitting a motion; and section 7825, supra, clearly contemplates the application being made upon notice, when a peremptory writ is sought in the first instance. Such notice may be given by means of the simple notice signed by counsel, or through the agency of an order to show cause, issued by the court or a judge.

This is a combined notice and motion.. The works on the subject all seem to contemplate application for the writ, either by notice or by order to show cause, and none of the approved forms of an order to show cause that we find contain the greeting which respondent contends is essential to jurisdiction. See the title 'Writ of Prohibition,' 14 Enc. of Forms, 987; Writ of Mandamus, 13 Enc. of Forms, 767, 13 Enc. of Pl. & Pr. 767." No. Pac. Ry. Co. v. Jurgenson (1913) 141 N. W. 70, 71, 25 N. D. 14 (Sup. Ct. N. D. 1913).

"It is contended the published order for constructive process is void because it did not run in the name of the state of Florida.

"Section 37 of article 5 of the Constitution, providing that, 'The style of all process shall be the State of Florida' and section 4230 (2590). Compiled General Laws of Florida 1927, providing that, 'All process shall run in the name of the State of Florida,' have reference to 'process' as used in the restricted sense, and have reference only to that character of process which under the common law would run in the name of the king, and have no application to statutes providing for constructive service in chancery. Burns v. Pittsburg Mortg. Inv. Co., 105 Okl. 150, 231 Pac. 887; McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662; Herndon v. Wakefield-Moore Realty Co., 143 La. 724, 79 So. 318; Curry v. Hinman, 11 Ill. 420; In re Abraham Bininger, 7 Blatchf. 262, text 274 (2d Cir.) Gilmer v. Bird, 15 Fla. 410; 20 Ency. Pl. & Pr. 1116." Gautier Properties v. Fla. Biscayne Trust Co. (1930) 129 So. 848, 849.

"Again, it is contended that both the Missouri and Kansas divorces are void because the publication notices did not run in the name of the state. The same contention was made in McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662, but not sustained. That decision is adhered to. The same rule appears to prevail in Missouri. Hansford v. Hansford, 34 Mo. App. 262. See also, Doan et al. v. Boley et al., 38 Mo. 449." Gordon v. Munn (1912), 125 Pac. 1, 3, 87 Kan. 642, Ann. Ca. 914.

"But we think a summons is not process within the mean-

ing of section 14, article 6 of our state constitution. It is merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it *process,* for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him. 'Process,' in a large acceptation, is nearly synonymous with 'proceedings,' and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. 7 Comyn, Dig. 120; 3 Bl. Comm. 279 et seq.; Bouvier, Law Dict. In this last sense it is manifestly used in the constitution, and when used in this sense we believe it only applies to judicial instruments issued by a court or other competent jurisdiction and returnable to the same. A summons, in our practice, therefore, we think, is not, in a strict or proper sense, or in the sense in which the word is used in the constitution, process." Hanna v. Russell, 12 Minn. Rep. 43, 45 (1882).

"It is further contended that the notice is void for the reason that it does not run in the name of the state of Oklahoma. Section 19, art. 7, of the Constitution provides that 'The style of all writs and processes shall be "The State of Oklahoma." Section 862, Comp. Laws 1921, provides: "The style of all process shall be 'The State of Oklahoma,' " etc. But manifestly, process as used in the Constitution and statute is in the restricted sense, and has reference only to that character of process which under the common law would run in the name of the king. 20 Ency. Pl. & Pr.; McKenna et ux. v. Cooper, 79 Kan. 847, 101 P. 662. The contention that the judgment is void for the reason that the de-

fendant was a resident of the state is not available in this proceeding. It is to be noted that the motion was not filed until more than three years after the judgment was rendered. Under such circumstances, the motion to vacate cannot be supported by evidence outside of the record. That is, the judgment was not void unless its invalidity appeared from the record. Pettis v. Johnston, 78 Okl. 277, 190 P. 681; Edwards v. Smith et al., 42 Okl. 544, 142 P. 302; E. R. Thomas Motor Car Co. v. Robb, 86 Okl. 266, 208 P. 783." Burns v. Pittsburg Mortgage Inv. Co. (1924) 231 Pac. 887, 889, 105 Okla. 150.

"Section 9 of the Declaration of Rights, contained in the Constitution of this State, provides that no person, shall be deprived of life, liberty or property without due process of law. Section 2 of Article 6 of the Constitution provides that 'the style of all process shall be "The State of Florida." The term, process, as used in these two sections, has not the same signification. In the first it is used in a large and comprehensive sense. In the second it is used in its most restricted and limited sense. Says Baron Comyn, "Process, in a large acceptance, comprehends the whole proceeding after the original and before judgment, but generally it imports the writs which issue out of any court to bring the party to answer, or for doing execution and all process out of the King's courts, ought to be in the name of the King. It is called Process because it proceeds or goes out upon former matter, either original or judicial."' . . .

"This clause does not prohibit the Legislature from establishing a general rule of practice by which notice of the institution of an action may be given by an attorney or party. It has never received such a construction by the courts. Where such an enactment is general and applies to all actions and to all individuals, as is the case of the Code, such notice by an attorney is in conformity to the law of the land, and a judgment depriving a party of his property after such notice is, in contemplation of law, a deprivation by due

process of law. Whether the notice given by the attorney be process or not, it is, for the reasons given, within the power of the Legislature, so far as this clause is a limitation, to authorize notice to be given in this manner. . . .

"But is a notice given by an attorney of the institution of a suit in a form similar to a summons, but not issuing out of a court, a process within the meaning of the Constitution? Baron Comyn, in giving the definition of the term process, says it imports the *writs which issue out of any court* to bring the party to answer or for doing execution. There is no definition of process given by any accepted authority which implies that any writ or method by which a suit is commenced is necessarily process. A party is entitled to notice and to a hearing under the Constitution before he can be effected, but it is nowhere declared or required that that notice shall be only *a writ issuing out of a court.*

"In the States in which has existed a Code similar to the one under which this action was brought, we find the courts of last resort holding that such notice or summons need not be entitled or styled in the name of the State, although the constitutional requirement is substantially the same as ours in regulating the style of process. 12 Wis. 529; 4 Iowa 43; 4 Mich. 588; 3 Penn. 99; 12 Min. 86." Gilmer v. Bird, 15 Fla. Rep. 410, 421, 422, 423 (1875).

"It is objected that the court refused to dismiss the proceedings on the ground of defective notice. The first defect urged is that the notice does not run in the name of the state of Iowa, as required by the Constitution. This court has decided in former cases that the notice provided by the Code is not a 'process,' as contemplated by the Constitution, and that it need not be in 'the style' of 'the State of Iowa.' " Nichols v. Burlington and Louisa County Plank Road Co. (1853) 5 Iowa Rep. (4 Greene) 42, 43.

"The action was commenced in June, 1859. The summons was signed by the respondent's attorney, and re-

quired the appellants to answer within twenty days, etc. The objections taken to the summons were: That it does not run in the name of 'The State of Wisconsin;' is not sealed with the seal of the court; is not properly tested in the name of the presiding judge; and does not give the appellants ninety days to answer, but requires them to answer within twenty days.

"When the nature and office of a summons are considered, as indicated by the code of procedure, which code is incorporated in, and becomes a part of our present Revised Statutes, we are clearly of the opinion that it cannot properly be said to be a 'writ,' or 'process,' within the meaning of chapter 136, Revised Statutes, and of section 17, article VII, of the Constitution. And it is quite evident that the legislature must have taken the same view of the matter, not regarding a summons as a 'writ' or 'process' within the constitutional meaning of those terms, or it would not have passed the sections of chapter 124 relating to it; for by the provisions of that chapter, it is expressly declared that an action may be commenced by service of summons with or without seal, which summons shall be subscribed by the plaintiff or his attorney, etc. It is not required to be issued out of a court of record, to be sealed with the seal of the court, and tested in the name of the presiding judge, as the writs contemplated by chapter 136, must be." Porter v. Vandercook et als. (1860) 11 Wis. 70.

Many states in addition to those whose decisions are cited above probably have provisions similar to section 106 of the Constitution of Virginia. This provides:

"Writs shall run in the name of the Commonwealth of Virginia and be attested by the clerks of the several courts. . . ." Va. Constitution, sec. 106.

But in those states as in Virginia the Bar has generally and properly concluded that such statutory or constitutional provisions in reference to writs or process, which is

one kind of writ, have no application to notices given by parties or their attorneys, where given as a means of instituting an action under sections similar to Virginia Code, section 6046.